

1993

Cory Chase v. Industrial Commission of Utah, Hercules Inc. (Employer), CIGNA (Insurance Carrier) : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

CORY CHASE

Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH,
HERCULES, INC. (Employer),
CIGNA (Insurance Carrier),

Respondent.

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Appeal No. 930271-CA

Priority No.: 7

REPLY BRIEF OF PETITIONER/APPELLANT CORY CHASE

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UTAH COURT OF APPEALS

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INTRODUCTION

Petitioner has reviewed the brief of Respondents, and it is his belief that Petitioner's Brief adequately addresses all issues referenced by Respondents, except for the third issue on appeal. Concerning Commissioner Carlson's visit to the job site.

On or about August 27, 1993, the Industrial Commission of Utah submitted a motion to supplement the record, requesting that the Court of Appeals admit, for consideration, the affidavit of Benjamin A. Sims. Said affidavit addresses the issues of notice given to Petitioner's counsel with regard to Commissioner Carlson's visit to the job site. On or about September 8, 1993, the Applicant filed an objection to said motion. On or about September 28, 1993, the Court of Appeals ruled that the motion would be deferred pending plenary presentation and consideration of the case. Consequently, any reference in the Respondent's Brief to Mr. Sims' affidavit should not be considered by the Court of Appeals and should be stricken from the record.

**A. Commissioner Carlson's visit to the job site
was not harmless error.**

The Respondents argue that even if Commissioner Carlson's visit to the job site was inappropriate, it was harmless error because the majority of the Commissioners had already made their minds up to reverse the Administrative Law Judge. The only

evidence that is submitted by Respondents that the majority of the Commissioners had previously formed their conclusions regarding the case was the affidavit of Benjamin Sims. Since that affidavit is not in the record to be considered, this argument must fail.

Even if the affidavit of Benjamin Sims was considered, the portion of his affidavit where he states that two of the Commissioners had decided to reverse the Administrative Law Judge is not admissible. It would be inadmissible hearsay evidence of state of mind of two other individuals besides the affiant. Furthermore, if Commissioner Carlson's visit to the job site was inconsequential, then why was it referred to in the Commissions' Order reversing the Administrative Law Judge.

B. The Commission did hold a hearing at the job site.

At the time of the visit to the job site, the parties were involved in a formal adjudicative process which had been commenced by the filing of an application for hearing by the applicant. Any hearings that were held after the commencement of said formal adjudicated process are subject to the due process requirements set forth in UCA 63-46b-8. Although it is true that the Commission may investigate facts on its own, when a hearing is held where representatives of the employer or defendant will be present, the applicant has a due process right to be present.

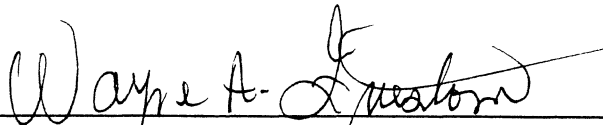
C. Petitioner was not given adequate notice of the visit to the job site.

Respondent's brief argues that petitioner's counsel was adequately notified of the hearing to be held at the job site by Commissioner Carlson, but bases that argument upon, once again, the affidavit of Benjamin Sims. Because said affidavit has not yet been accepted into the record, and because applicant should be given adequate opportunity to conduct discovery and respond to said affidavit before it is accepted into the record, any references to said affidavit or conclusions based upon said affidavit should be disregarded by the court and stricken from the record.

CONCLUSION

Based upon the Petitioner's Brief and the foregoing Reply Brief of Petitioner, the petitioner respectfully requests that this court reverse the Industrial Commissions Order in the above-referenced matter.

DATED this 1 day of October, 1993.



WAYNE A. FREESTONE
Attorney for Applicant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the Reply Brief of Petitioner/Appellant Cory Chase, First-Class Mail, postage pre-paid, on this 4 day of October, 1993, to the following:

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